MOHD ROZNEH JAINEH A

v.

PP

HIGH COURT SABAH & SARAWAK, KOTA KINABALU B
LEE HENG CHEONG JC
[CRIMINAL APPEAL NO: BKI-42-73-9-2011]
8 AUGUST 2012

CRIMINAL LAW: *Corruption - Corruptly accepting gratification - Testimonies of prosecution witnesses - Whether ambiguity arose as to exact purpose of gratification - Whether material gap existed in prosecution's evidence - Whether prosecution witnesses were accomplices of appellant - Whether conviction and sentence to be quashed - Malaysian Anti-Corruption Commission Act 2009, s. 17* C D

CRIMINAL PROCEDURE: *Appeal - Appeal against conviction and sentence - Corruptly accepting gratification - Malaysian Anti-Corruption Commission Act 2009, s. 17 - Testimonies of prosecution witnesses - Whether ambiguity arose as to exact purpose of gratification - Whether material gap existed in prosecution's evidence - Whether prosecution witnesses were accomplices of appellant - Whether conviction and sentence to be quashed* E

This was an appeal against both conviction and sentence lodged by the appellant who was convicted by the Sessions Court on two counts under s. 17(a) the Malaysian Anti-Corruption Commission Act 2009. The appellant was sentenced to three months' imprisonment and a fine of RM10,000 in default to six months' imprisonment for the first charge and eight months' imprisonment and a fine of RM10,000 in default to six months' imprisonment for the second charge. Briefly, the facts showed that the appellant was a meter reader and an agent of Sabah Electricity Sdn Bhd. On 15 July 2009, the appellant was alleged to have corruptly agreed to accept gratification in the sum of RM100 from PW12 (first charge) and on 10 August 2009, the appellant was alleged to have corruptly agreed to accept gratification in the sum of RM500 from PW11 (second charge) as an inducement to forbear to do an act in relation to his principal's affairs, by not taking action against PW12 and PW11, who had fixed illegal electricity connections from their respective houses to nearby F G H I

houses. The appellant was arrested after being trapped by the MACC through prosecution witnesses, PW12 and PW11, who had lodged a report. The issues that arose were: (i) whether based on the respective testimonies of PW12 and PW11, an ambiguity arose as to the exact purpose of gratification thus raising some material gap in the prosecution's evidence; and (ii) whether PW12 and PW11 were accomplices of the appellant.

Held (quashing conviction and sentence imposed against appellant):

(1) There were three conflicting versions of evidence "pengurusan boss dia", "perlindungan kami" and "pengurusan dia" which were adduced by the prosecution's witnesses pertaining to the exact purpose of the gratification. Any ambiguity should be resolved in favour of the accused. Some material gap was raised in the prosecution's evidence when the appellant was charged with an offence of gratification that was in relation to his official affairs. The evidence adduced must lead to that issue only and nothing else. Hence, the trial judge misdirected himself when he made no finding on this issue. (paras 13-15)

(2) The acts of PW12 and PW11 who were actively involved in bribing the appellant was motivated with an illegal act committed by them *ie*, by causing illegal electricity connection. The inconsistencies and contradictions of PW12 and PW11's evidence was a true reflection of the role of both witnesses as accomplices to the accused. As such, their evidence may render both of them to be unreliable witnesses unless they were corroborated with other independent evidence. (paras 19, 22 & 23)

(3) The prosecution had failed to prove a *prima facie* case against the appellant and he was entitled to an acquittal. In the premises, the conviction and sentence imposed against the appellant was quashed. (para 24)

Case(s) referred to:

Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2004] 3 CLJ 737 FC ***(refd)***

Mohd Sallehuddin Mohd Yusof v. PP [2003] 1 LNS 687 HC ***(refd)***

Muthusamy v. PP [1947] 1 LNS 71 HC ***(refd)***

PP v. Mohd Alias Mohd Kamis [1994] 1 MLJU 248 ***(refd)***

PP v. Rahiman Selamat (Rayuan Jenayah No: 42A-21-2001) (Unreported) ***(refd)***

Ramli Sutu v. PP [1998] 5 CLJ 671 HC ***(refd)*** A
Rattan Singh v. PP [1970] 1 LNS 132 HC ***(refd)***
Sia Soon Suan v. PP [1965] 1 LNS 165 FC ***(refd)***

Legislation referred to:
Anti-Corruption Act 1997, s. 44
Malaysian Anti-Corruption Commision Act 2009, ss. 17(a), 52(1)(a) B
Prevention of Corruption Act 1961, s. 18

For the appellant - Zamzuri Pandikar Amir; M/s Ling Lo & Zamzuri
For the respondent - Joyce Blasius; DPP

Reported by Suhainah Wahiduddin C

JUDGMENT

Lee Heng Cheong JC: D

Introduction

[1] This is an appeal against both conviction and sentence lodged by the appellant who was convicted by the Sessions Court in Kota Kinabalu on two counts under s. 17(a) of Akta Suruhanjaya Pencegahan Rasuah 2009 ("the Act"). E

[2] The appellant was sentenced to three months' imprisonment and a fine of RM10,000 in default of six months imprisonment for the 1st charge and eight months' imprisonment and a fine of RM10,000 in default of six months imprisonment for the 2nd charge. Both sentences to run consecutively from 23 September 2011. A stay of execution of the imprisonment terms was granted by the learned Sessions Court Judge but the fines have to be paid forthwith. F G

[3] Briefly the fact of this case is this. The appellant is an agent of Sabah Electricity Sdn Bhd, being a meter reader Grade PS4 and was stationed at Tanjung Kapor Darat of Kudat from June until December 2009. This fact is not disputed during the trial. H

[4] On 15 July 2009, at about 8pm at the side gate of Kudat Library, the appellant was alleged to have corruptly agreeing to accept gratification in the sum of RM100 from Jobit bin Motinggi (who is PW12 in the trial at the Sessions Court), as an inducement to forbear to do an act in relation to his principal's I

affairs, by not taking an action against Jobit bin Motinggi and Mozugin bin Mamigan (PW11 in the trial at the Sessions Court). Both of them have fixed illegal electricity connections from their house at Tanjung Kapor Darat to nearby houses. That is the gist of the first charge.

[5] And on 10 August 2009 at about 9.40pm at the Esplanade Sidek Food Stall, the appellant was alleged to have corruptly agreeing to accept gratification in the sum of RM500 from PW11 as an inducement to forbear to do an act in relation to his principal's affairs by not taking an action against PW11, who had fixed illegal electricity connections from his house at Tanjung Kapor Darat to nearby houses. This is the gist of the second charge.

[6] The appellant was arrested on the same day and time as in the second charge after being trapped by the MACC through prosecution witnesses, PW12 and PW11. The plan was initiated by MACC after both PW12 and PW11 went to the MACC office at Kota Kinabalu on 6 August 2009, to lodge a report on this matter.

Consideration Of The Grounds Of Appeal

[7] Section 17(a) of the Act provides that:

> A person commits an offence if (a) being an agent, he corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification as an inducement or a reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business;

[8] According to the testimonies of PW11 and PW12, the purpose of the graft was for "pengurusan boss dia, perlindungan kami dan pengurusan dia" and/or "tidak mengambil tindakan terhadap kesalahan yang saya buat, iaitu melakukan penyambungan elektrik secara haram dari rumah saya ke rumah saudara yang berhampiran?".

[9] I find that the defence has rightly challenged this piece of evidence in cross-examination of both witnesses and in their respective submissions here and in the court below.

[10] On the other hand, I noted that the learned DPP in her submission pointed out that the inducement merely meant that not to take an action against PW12 and PW11 for having made the illegal electricity connections. The learned DPP said that this all meant one thing which is not to take an action against PW12 and PW11 for having made illegal electricity connection as stated in the two charges.

[11] In this regard, reference to the case of *Ramli Sutu v. PP* [1998] 5 CLJ 671 was made whereby Tee Ah Sing J (as he then was) stated that:

> PW1's ambiguity about the purpose of the money – said it was license fee and also sponsorship – "which is which" he did not know. *Ambiguity must be resolved in favour of the accused* which the learned Sessions Court Judge had not done. This is a fatal error. (emphasis added).

[12] Normally, when the High Court sits in the appellate jurisdiction, it will not interfere or disturb findings of fact of the learned trial judge especially with regards to the demeanour of witnesses whereby the latter had better opportunity in seeing them testify in court. But that is not applicable when there is misdirection that may cause injustice on behalf of the appellant. In the case of *Mohd Sallehuddin Mohd Yusof v. PP* [2003] 1 LNS 687, VT Singham J held that:

> Mahkamah ini berpendapat bahawa sekiranya Mahkamah ini yang bersidang sebagai Mahkamah Rayuan berpuashati bahawa Hakim perbicaraan telah tersilap di atas fakta-fakta dan juga dari segi undang-undang di mana Mahkamah itu yang sepatutnya mempunyai peluang untuk melihat dan mendengar saksi-saksi tidak dengan mencukupi menggunakan peluangnya atau alasan-alasannya untuk pendapatnya atau pendapatnya diberi dengan gagal mengambil kira keterangan-keterangan yang penting dan relevan dari segi kehakiman di atas keadaan tersebut, *Mahkamah ini boleh masuk campur di atas pendapat Mahkamah perbicaraan di mana keputusannya mungkin berlainan dan akan memberi manfaat keraguan kepada seorang tertuduh* dan dalam kes ini kepada perayu. Dalam keadaan itu, Mahkamah ini berhak untuk menolak pendapat Hakim perbicaraan dan membuat keputusan seperti yang dikehendaki berdasarkan kepada keterangan dan dari segi undang-undang. (emphasis added).

[13] In this case, based on respective testimonies of PW12 and PW11 in the record of appeal, an ambiguity arose as to the exact purpose of gratification and it remained unresolved. I find that there are three conflicting versions of evidence, there are "pengurusan boss dia", "perlindungan kami" and "pengurusan dia" which were adduced by the prosecution's witnesses. Any ambiguity should be resolved in favour of the accused (see *PP v. Mohd Alias bin Mohd Kamis* [1994] 1 MLJU 248).

[14] In view of this issue, it raised some material gap in the prosecution's evidence when the appellant is charged with an offence of gratification that is in relation to his official affairs. The evidence adduced must lead to that issue only and nothing else. In the case of *Sia Soon Suan v. PP* [1965] 1 LNS 165, Ong Hock Thye AGCJ (Malaya) speaking from the bench of the Federal Court held that:

> The requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. *Irrespective whether the court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else* and therefore the appeal must be allowed and conviction quashed. (emphasis added).

[15] With respect, I find that the learned trial judge has misdirected himself when there is no finding on this issue and consequently entered a conviction against the appellant. That misdirection has occasioned a failure of justice and based on the aforesaid authorities cited, it is fatal and the conviction ought to be quashed.

[16] Another issue is whether PW12 and PW11 are accomplices of the appellant. In his submission, learned counsel for the appellant submitted that both of them are the ones who offered monies to the accused for the illegal electricity connection. They were actively involved in bribing the appellant, negotiated with each other to gather resources to pay the appellant and they agreed to do so. He made reference to the case of *Rattan Singh*

v. PP [1970] 1 LNS 132 whereby Syed Agil Barakbah J (as he then was) referred to s. 18 of the Prevention of Corruption Act 1961. That provision reads:

> Notwithstanding any rule of law or written law to the contrary, no witness shall, in any such trial or inquiry as is referred to in section 17, be presumed to be unworthy of credit by reason only of any payment or delivery by him or on his behalf of any gratification to an agent or member of a public body.

[17] However, the learned DPP rebutted this issue by submitting that s. 18 of the Prevention of Corruption Act 1961 has been repealed by virtue of the Anti-Corruption Act 1997 and the introduction of s. 44 as a new provision. That particular s. 44 of the Anti-Corruption Act 1997 has been adopted in the Act to wit s. 52(1)(a). It reads:

> Notwithstanding any written law or rule of law to the contrary, in any proceedings against any person for an offence under this Act:
>
> (a) no witness shall be regarded as an accomplice by reason only of such witness having:
>
> (i) accepted, received, obtained, solicited, agreed to accept or receive, or attempted to obtain any gratification from any person;
>
> (ii) given, promised, offered or agreed to give any gratification; or
>
> (iii) been in any manner concerned in the commission of such offence or having knowledge of the commission of the offence;

[18] The learned DPP in her reply submission referred to the case of *Raman Mariappen v. PP* [2011] 1 CLJ 739 which followed the principle adopted in an unreported case of *PP v. Rahiman Selamat* (Dalam Mahkamah Tinggi Malaya Kuala Lumpur (Rayuan Jenayah No. 42A-21-2001)). In this unreported case, Dato' Ahmad bin Hj Maarop J (as he then was) held that howsoever a witness involved in the commission of a crime under the Anti Corruption Act 1997, he can never be regarded as an accomplice.

[19] With respect, I find that this submission by the learned DPP is without merits. This is because I find that the acts of PW12 and PW11 who were actively involved, in bribing the appellant was motivated with an illegal act committed by them, ie, caused

A to do illegal electricity connection. And those illegal acts of illegal electricity connection are continuing even at the trial of this case as admitted by both PW12 and PW11 in cross-examination. Section 52(1)(a) of the Act is silent on this issue.

B **[20]** Both PW12 and PW11 had to resort to the MACC when they allegedly have insufficient money to give to the accused. This is, in my opinion, the 'infamous act' as stated in the case of *Rattan Singh v. PP (supra)*, whereby it was held that, at para. 5:

> C Though the word "accomplice" does not appear, this section modifies the law and practice not as to accomplices generally, but only as to a specified class of accomplices so that a witness who is an accomplice only by reason of making a corrupt payment is not presumed to be unworthy of credit. (See *Soosay Dass v. PP* [1951] MLJ 57). If, however, he has played a more active D part in the transaction apart from the bare payment, he is not protected by the section and the ordinary rules as regards accomplices apply. (See *Daimon bin Bandav. PP, supra*). Considering the parts played in the case by PW1, in the circumstances there was no doubt that his action went beyond concurrence, because after concurring, he went to see his two E colleagues, PW2 and Mahadevan, and suggested that each of them should raise the money to pay the appellant to which they all agreed. He did not make a report until after PW2 had told him that he (PW2) had already done so. In other words, he was quite prepared to bribe the appellant and negotiated with PW2 and F Mahadevan on the matter. *In my view, this amounted to an infamous conduct and therefore he was an accomplice in the real sense of the word.* The learned president therefore misdirected himself when he concluded that it was too early a stage to treat PW1 as an accomplice. (emphasis added).

G **[21]** The principle as regards to an accomplice in that case is still applicable to the present case notwithstanding that the Prevention of Corruption Act 1961 has been repealed when both PW12 and PW11 were actively involved in the transaction apart from the bare payment to the appellant as discussed earlier.

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[22] I find that PW12 and PW11 are accomplices and as such their evidence, as a matter of prudence, must be independently corroborated with other evidence. Alternatively, it has been a rule of practice that the learned trial judge to have expressly warned I himself on the danger of convicting the appellant based on the uncorroborated accomplices' evidence unless that there are circumstances that make it safe to dispensed with (see *Dato' Seri Anwar Ibrahim v. PP and Another Appeal* [2004] 3 CLJ 737).

Unfortunately, from the record, the learned trial judge did none of the aforesaid because he did not find both witnesses/complainants as accomplices to the appellant.

[23] The inconsistencies and contradictions of PW12 and PW11 evidence (the three conflicting versions of evidence discussed earlier), as pointed out by the learned DPP in her submission, does not render both of them to be unreliable witnesses and make the whole of their evidence unacceptable. But in my view, that inconsistencies would be a true reflection of the role of both witnesses as accomplices to the accused. As such, their evidence may render both of them to be unreliable witnesses unless they are corroborated with other independent evidence. Reference may be made to the case of *Muthusamy v. PP* [1947] 1 LNS 71 whereby it was held that:

> **A perfectly truthful witness may mention a detail on one occasion and not remember it on another.** (emphasis added).

[24] Based on the above reasons, I find that the prosecution had failed to prove a *prima facie* case against the appellant and he is entitled to an acquittal. In the premises I quashed the conviction and sentence imposed against the appellant. The fine, if paid, to be refunded to the appellant.